Neutral Citation Number: [2013] EWCA Civ 1450

Case No: A3/2012/0471

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION, COMMERCIAL COURT
Mr Justice Eder
2012 EWHC 200 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/11/2013

Before :

LORD JUSTICE RIX

LORD JUSTICE PATTEN
and
LORD JUSTICE TOMLINSON

- -

Between :

Ryanair Limited	**Respondent / Claimant**
- and -	
Esso Italiana Srl	**Appellant / Defendant**

Stephen Auld QC and **Eleanor Campbell** (instructed by **Enyo Law LLP**) for the **Respondent**
Daniel Beard QC (instructed by **Hogan Lovells International LLP**) for the **Appellant**

Hearing date : 22 January 2013

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Approved Judgment

Lord Justice Rix :

1. This appeal concerns the scope of an English jurisdiction clause and arises on a challenge to jurisdiction in the English courts. Does the clause embrace a claim against a member of an Italian cartel selling jet fuel in Italian airports, a claim advanced on the basis of a statutory tort under English law in vindication of rights arising out of article 101 of the Treaty on the Functioning of the European Union ("TFEU")?

2. The claimant is Ryanair Limited ("Ryanair"), the well-known Irish airline. The defendant is Esso Italiana Srl ("Esso Italiana"), part of the world-wide ExxonMobil group. The jurisdiction clause is contained in their contract, entered into through the agency of ExxonMobil Aviation International Limited ("EMAIL"), for the purchase of jet fuel in Italian airports. The jurisdiction clause is found in article 12.1 of Part II of a master contract, made by EMAIL on behalf of group subsidiaries supplying fuel in various countries of the world, which was originally entered into with Ryanair back in 1999, then in a slightly different form in 2000, and subsequently renewed annually until expiry on 31 April 2006.

3. Article 12.1 provides as follows:

> "This Agreement contains the entire agreement of the parties with respect to the subject matter hereof and there are no other promises, representations or warranties affecting it. This Agreement cannot be modified in any way except in writing signed by the parties. No claims shall be made hereunder for prospective profits or for indirect or consequential damages except as otherwise provided in the footnotes attached to the schedule. This Agreement shall be governed by the laws of England excluding its conflict of law rules and the United Nations Convention on the International Sale of Goods Act shall not apply. For the purposes of the resolution of disputes under this Agreement, each party expressly submits itself to the non-exclusive jurisdiction of the Courts of England."

4. Thus the parties' contract was made on the basis of English law and the non-exclusive jurisdiction of the English courts. Prospective profits and indirect or consequential damages were excluded. It is not clear what follows from the exclusion of English conflict of law rules, which might be said to be a large exclusion, but no point has been taken on that.

5. Ryanair's claim takes its point of departure from a decision of the Italian Competition Authority (the "ICA") dated 14 June 2006, which found certain oil companies selling jet fuel at various airports in Italy, including Esso Italiana, to be in breach of article 81 of the EC Treaty, now article 101 of the TFEU. The ICA decision found that as a result of information sharing arrangements the suppliers were operating a cartel the effect of which was to set up barriers to entry and distort and inflate the price of jet fuel supplied at various Italian airports. The distortion did not affect the international price of the fuel, which was premised on Platts market prices, but there was evidence that it tended to push up the "differential", ie an increment on market prices which was intended to cover additional expenses and services which a supplier of jet fuel to an airline would respectively incur or supply. The ICA decision explained:

> "220. As seen earlier in the section dedicated to the description of the market, the price that the airlines pay for the supplying of *jet fuel* is a result of the aggregation of different components. Some of these components are not subject to the contracting between oil company and airline: the value of the product on the international market (Platts quotes), the airport tariffs, the tariffs for the utilization of fixed systems such as hydrant systems, piers, etc. Then there exists a further component (cad [*sc, perhaps* called] "differential"), that is established in the contract between the airline and the oil company, and it is on this component that the effects of competition between suppliers can mainly be exercised."

6. The ICA imposed fines on the members of the cartel. In the case of Esso Italiana the fine was €66,690,000. There was an appeal in Italy against the ICA decision to the Consiglio di Stato, but the court's judgment of February 2008 dismissed it.

7. For present purposes the critical finding of the ICA decision was that the Italian differentials tended to be higher than elsewhere in Europe. The decision cited figures for 2004 supplies to an Italian airline, Meridiana, and continued:

> "228. The table clearly shows that the differentials charged for deliveries in the three main Italian airports are significantly higher (at a rate of 50% or more) than those airports of comparable size, if not of a smaller size (such as Paris Orly and Brussels) or significantly smaller (such as Cologne). Moreover, an Italian airline would enjoy more favourable conditions in domestic airports than in foreign airports.
> The different conditions applied, however, are not justified by reasons such as high airport fees which at Fiumicino and Malpensa airports are charged on the price of fuel: these charges, in fact, amounted in 2004 to €7-8 per 1,000 litres of fuel sold, while the differences at issue here are about €10-20 per 1,000 litres. For deliveries to medium-sized airports (Nice, Linate, Bordeaux, Lyons and Ciampino), prices are more similar and in any case are based according to airport size."

8. If I understand this paragraph correctly, the ICA is saying that at the three largest Italian airports there was evidence of the differential being €10-20 per 1,000 litres greater than at comparable European airports, although account would have to be taken of the fact that at two of those three airports there was an element of €7-8 per 1,000 litres which was caused by airport fees included in the differential. However, where smaller airports were concerned, the differential was smaller, and prices became "more similar". Be that as it may, and we are not presently concerned with matters of quantum, Ryanair has used the highest figure cited there of €20 in order to identify its claim against Esso Italiana.

9. By an amendment encouraged by the judge below, Mr Justice Eder, Ryanair has reformulated its claim to be "at least" as follows: (1) a loss of €20 per metric ton on 72,984 tonnes of fuel supplied to it between 1999 and 2006 by Esso Italiana under their contract: a total of €1,459,671 (plus "loss of profit"); (2) a loss of €20 per metric ton on 374,391 tonnes of fuel supplied to it by all members of the cartel (including Esso Italiana) in the same period: a total of €7,487,823.19. The first claim is described as a claim for "breach of contract"; and the second claim is described as one for loss

arising from Esso Italiana's "breach of statutory duty". The theory of the latter claim is that each member of the illegal cartel is severally as well as jointly liable to any member of the public for all the losses caused by the operation of the cartel. Ryanair's original pleading had put the claim for breach of statutory duty first, and the claim in respect of fuel supplied by Esso Italiana under the contract second, as an alternative claim.

10. It is not readily apparent what the jurisdictional link between England and Esso Italiana may be so far as Ryanair's claim for breach of statutory duty is concerned: the claim is made against an Italian company in respect of its participation in Italy with other Italian suppliers of fuel oil in Italy in arrangements which an Italian regulatory agency has found to be unlawful pursuant to article 101. The theory of Ryanair's position, however, is that the breach of contract claim is firmly anchored to the contract as requiring an indemnity under its article IV (see below), and that in these circumstances the breach of statutory duty claim, being a claim pursuant to article 101 under English law, also falls within the contract's non-exclusive English jurisdiction clause.

11. Article IV falls, like article XII, within the General Provisions of part II to the contract. It provides as follows:

> "ARTICLE IV - PRICES
> 4.1 If at any time a price or fee provided in this Agreement shall not conform to the applicable laws, regulations or orders of a government or other competent authority, appropriate price or fee adjustments will be made; provided, however, that in the event Seller is at any time prevented from collecting, or Buyer is required to pay more than, the full price or fee provided for in this Agreement, including changes in said price or fee pursuant to other provisions hereof, the party adversely affected shall have the option at any time thereafter while such condition exists to cancel this Agreement as to any affected delivery location upon fifteen (15) days prior written notice to the other."

12. It is important to observe that Ryanair at no time asserted that its claim for breach of statutory duty fell within the jurisdiction clause in the absence of a concomitant contractual claim under article IV in respect of the lower quantity of fuel supplied by Esso Italiana itself, which was itself premised on Esso Italiana participating in infringing behaviour in breach of article 101. When the question of whether article IV did indeed cover its contractual claim came to the fore (see below), Ryanair submitted for the first time that, if necessary, it could rely on an implied contractual term that Esso Italiana's prices would not be inflated as a consequence of any breach by Esso Italiana of EU competition law.

The judgment below

13. Thus in the commercial court Ryanair put the matter in the following way, as described by Eder J in his judgment:

"6…In essence, what is said is that Esso Italiana participated in infringing behaviour in breach of Article 101…Therefore, the prices charged for the fuel supplied by Esso Italiana to Ryanair in Italy were not in conformity with the applicable law and Esso Italiana is in breach of clause 4…that is what is referred to as the "contract claim".
7. It is an essential part of that contract claim that Esso Italiana participated in infringing behaviour in breach of Article 101…
25. On the basis of *Fiona Trust*, Mr Auld QC, acting on behalf of Ryanair, submitted that it was authority for the following propositions: (1) It is to be presumed that rational businessmen who are parties to the contract intend all questions arising out of their legal relationship to be determined in the same forum. (2) This presumption is a strong one and requires clear words to the contrary to be displaced…
38…Mr Beard QC submitted that it is at least odd that, in the context of a jurisdiction clause which expressly states that the agreement is governed by the laws of England, the parties might have contemplated that the jurisdiction clause extends to a potential claim for breach of statutory duty under Italian law. Mr Auld QC accepts for present purposes only that the claim for breach of statutory duty is one which would be governed by Italian Law, although his case is, or at least might be (and he reserves his position) to say in due course that the claim for breach of statutory duty is in fact one of English law…
39. I am bound to say that I was initially impressed by this particular argument of Mr Beard QC. However, it seems to me that Mr Auld QC's answer is correct and that, although it might seem odd that such a claim might fall within the jurisdiction clause, the fact of the matter is that the contract claim itself will necessarily involve, or at least arguably necessarily involve, a consideration of the position under Italian Law because of the terms of article 4.1 and its reference to "the applicable laws, regulations and orders of a government or other competent authority". I do not have to decide that at this stage…
42…I have to consider that the rational or reasonable business man would have contemplated that there would, or at least might be, a contractual claim…
43. It seems to me incontrovertible that the reasonable and rational businessman would also have contemplated that the claims against Esso Italiana in respect of breach of statutory duty in relation to the fuel supplied under this particular contract could equally be advanced in England. In my opinion, those two claims are beyond any doubt whatsoever claims which are "so closely knitted together", using the words of Leggatt LJ in *The Angelic Grace*. Also, looking at the speeches in the House of Lords in *Fiona Trust*, I am of the view that a reasonable and rational businessman would be taken to have agreed that a single tribunal would resolve both those disputes. It seems to me that there is an almost complete overlap between those two claims…
44. Mr Beard QC has a much more forceful case with regard to the wider claims that Ryanair seek to advance against Esso Italiana i.e., the claims for losses based upon breach of statutory duty in relation to fuel supplied under contracts with other third party cartel members. Mr Beard QC is right in particular that the nature of the losses in relation to such other claims is potentially wider and much larger. He submitted that it is not conceivable that a rational business person would agree to such potentially wider and larger claims being dealt with in one jurisdiction.

> 45. As I have said, I have found this part of the case much more difficult. However, it seems to me that Mr Auld QC is right that, in considering a claim against Esso Italiana for breach of statutory duty in respect of losses allegedly suffered arising out of the other contracts with other cartel members, it would be a "forensic nightmare" that the contract and the more limited claim for breach of statutory duty would be pursued in England; whereas the claim in relation to the second limb for breach of statutory duty would be pursued in some other jurisdiction…"

14. It seems to me that the argument accepted by Eder J therefore proceeded as follows. (i) The claim under article IV was a claim under the contract for breach of contract in the absence of a price adjustment. (ii) That claim itself involved consideration of a breach of law in Italy pursuant to article 101, which was the necessary trigger for a claim under article IV. (iii) The "first limb" of the statutory duty claim, ie a claim for breach of statutory duty by Esso Italiana in respect of the fuel supplied by it to Ryanair under the contract, covered the same ground as the contract claim under article IV. (iv) Therefore the contract claim and the first limb of the statutory duty claim were "so closely knitted together", as in *The Angelic Grace* [1995] 1 Lloyd's Rep 87 (CA). (v) The "second limb" of the statutory duty claim, ie that part of it which concerned the much greater quantity of fuel supplied in Italy by suppliers *other than* Esso Italiana, was another matter, but on the whole it would be a "forensic nightmare" (see Steyn LJ in *Continental Bank NA v. Aeakos Compania Naviera SA* [1994] 1 WLR 588 at 593D) if that were adjudicated separately and therefore it was to be presumed that rational businessmen would have considered that the jurisdiction clause was intended to cover such a claim (Esso Italiana's joint and several liability for the breach of statutory duty committed by any cartel member who had supplied Ryanair) as well.

15. It follows that the whole edifice of this reasoning is built on the initial claim, the contract claim, that Ryanair had a remedy pursuant to article IV of the contract.

The issue as to the validity of the Article IV claim

16. At the hearing in this court, the question therefore arose as to whether there was any prospect of Ryanair being able to bring itself within article IV. That question was raised by the court because Esso Italiana was at one and the same time saying that, for the purpose of jurisdiction it was accepted that there was a contractual claim pursuant to article IV, but also that it was intending to submit at a later stage that, upon a construction of that article, such a claim had no prospect of success. Thus in his judgment below, Eder J accurately said that it was conceded by Esso Italiana that the English court did have jurisdiction over Ryanair's claim in contract (see at paras [11] and [17] of his judgment). However, it was also clear from its written skeleton argument before Eder J himself that Esso Italiana's position was that Ryanair's contractual claim had no foundation.

17. Thus in its skeleton argument before Eder J (at its paras 1.6/7) Esso Italiana had submitted as follows:

> "There is a governing law and non-exclusive jurisdiction clause in the Contract in favour of the English courts (Section 12.1). Esso Italiana accepts that that Section 12.1 means that the Contract Claim can be heard in the English courts. . . . It does, however, strenuously resist the Contract Claim as having no foundation and has reserved its position as to whether any further legal steps should be taken in relation to it…The present application concerns only the Breach of Statutory Duty Claim."

18. That was consistent with Esso Italiana's first skeleton to the Court of Appeal which raised, although it has to be said obliquely, the submission that article IV was not intended to deal with anti-trust laws as distinct from governmental fuel price regulation (see at para 94 and footnote 7); and with Esso Italiana's supplementary skeleton in the Court of Appeal, which had a more extensive passage (at paras 33-38) submitting that "Ryanair's reliance on Clause 4 of the Agreement does not assist it", that the contract claim was "bogus" and would be subject to further challenge, and that "Ryanair cannot pull itself up by its own bootstraps".

19. It was as a result of such submissions, and the essential structure of Ryanair's argument and the judge's judgment, which were both premised on the existence of a contractual claim within the jurisdiction clause, that, on the hearing of this appeal, the court itself raised with Mr Daniel Beard QC, counsel for Esso Italiana, exactly what was being said about the validity of the contractual claim. For it seemed to be a necessary part of Ryanair's argument based on the *Fiona Trust* presumption in favour of the rational and reasonable businessman's preference for one-stop adjudication, that a contractual claim based on article IV for a breach of article 101 had some prospect of success. If, therefore, there was no contractual claim under article IV by reason of Esso Italiana's supply of jet fuel at prices inflated by conduct in breach of article 101, then, at any rate arguably, it became harder to see why reasonable businessmen would interpret the jurisdiction clause as covering a separate claim for breach of statutory duty arising out of conduct in Italy in breach of article 101.

20. As a result of the discussion which then occurred, it became reasonably clear that Esso Italiana did wish to submit, if it could, that the hopelessness of any claim under article IV ought to be taken into account as part of the jurisdictional challenge. It also emerged that Esso Italiana had previously shied away from that argument because of a concern that it might constitute a submission to the jurisdiction. The court considered that that was not the case. It was often part and parcel of a challenge to the jurisdiction that a claim raised no proper issue for trial. Provided that such arguments, legitimately connected to a challenge to the jurisdiction, were made under cover of a challenge to the jurisdiction, it was hard to see how it could be said that a defendant was submitting to the jurisdiction by raising an argument that was necessary to his challenge. In any event, although on behalf of Ryanair Mr Stephen Auld QC submitted that it was too late to withdraw the concession that had been made with respect to the contract claim, because it would be unfair to Ryanair to permit Esso Italiana to do so and to argue the point of whether there was a triable issue under article IV, he did not submit that such a withdrawal was technically impossible. Indeed, Ryanair had, in the run-up to the hearing before Eder J, urged Esso Italiana to set out the substance of its defence to the contract claim and undertook not to rely on any steps taken by Esso Italiana in doing so as a submission to the jurisdiction for the

purposes of the statutory duty claim. Moreover, Mr Auld accepted that even where a claim form is served without permission under the Judgments Regulation, it is open to challenge the court's jurisdiction on the basis that the claim has no reasonable prospect of success (see his further supplemental skeleton argument at para 6.3(2)).

21. In the circumstances, we considered that it was necessary to consider the parties' jurisdictional arguments in the round. If a breach of statutory duty pursuant to article 101 did not sound in contractual damages pursuant to article IV, then the whole premise of Ryanair's claim to jurisdiction with respect to the statutory duty claim, and the reasoning of the judge's judgment, fell to the ground. Jurisdiction would have been obtained on the basis that there was an arguable contractual claim which partly covered the same ground as the "first limb" of the statutory duty claim and was otherwise sufficiently connected to the "second limb" of that claim to entitle a conclusion that the parties must reasonably be regarded as agreeing that the jurisdiction clause covered both claims in their entirety. It was possible however that there was no contract claim which had a reasonable prospect of success in which case there was nothing on which to hang the argument of an interpretative presumption, as to the width of the jurisdiction clause, in favour of one-stop adjudication. If that possibility turned into actuality, it would be wholly unfortunate for jurisdiction to be obtained on a misapprehension of the scope of article IV and of the jurisdiction clause.

22. We therefore gave directions at the conclusion of the first day's hearing of this appeal, adjourning the appeal part heard, giving time to Esso Italiana to serve any amended grounds of appeal and to the parties to serve any further supplementary skeleton arguments or evidence, and reserving costs.

The adjourned hearing

23. At the adjourned hearing, Mr Auld renewed his submissions that it would be unfair to allow Esso Italiana to go back on its earlier concession that there was jurisdiction to hear the contract claim or on its previous decision to reserve argument as to the construction and applicability of article IV to a subsequent hearing. However, we were not persuaded by these submissions, and gave an oral decision to that effect, reserving our reasons for this judgment.

24. Our reasons were that it was necessary to a proper understanding of the jurisdictional challenge to consider whether the contract envisaged a contractual claim arising out of a breach of article 101, as well as our rejection of the submission that there would be any unfairness to Ryanair in approaching the article IV and article 12.1 issues holistically. Mr Auld quite properly showed us everything which made plain that Esso Italiana did accept that the contract claim was within the jurisdiction clause, and that is not in doubt. However, it is equally not in doubt that this did not proceed on the basis of any concession that the contract claim was arguable, but rather on a mistaken view as to the proper time for taking the point that it was not. It seemed to us, however, that it would be impossible properly to evaluate Ryanair's submission that the statutory duty claim was so closely linked to the contract claim as to permit the conclusion that the parties must be taken to have contracted on the basis that it would fall within the jurisdiction clause, without at the same time evaluating the argument,

which we were satisfied that Esso Italiana had always wished to advance but had mistakenly deferred, to the effect that article IV, which was the basis of Ryanair's contract claim, did not envisage or cover a claim based on conduct contrary to article 101. In the circumstances, there was no unfairness in permitting the argument on article IV, which would have to be considered at some point, to be considered at the point when it could throw light on the proper width of the jurisdiction clause and the proper forum for the statutory duty claim.

25. Meanwhile, the court had allowed the parties time to develop any argument based on evidence that the interpretation of article IV could not be grasped at this stage because of matters of matrix or context, but no such evidence was relied on by Ryanair. There was a bare submission by Mr Auld that there was not time to develop any such evidence: but in the absence of any indication of what evidence might have been sought and was wanting, we considered that this submission carried no weight at all. We considered that we had allowed sufficient time for the development of such evidence, if there was any such evidence to be brought forward. Mr Auld accepted that the question of what claims the jurisdiction clause covered was ultimately a question of construction of the contract.

26. We therefore gave permission for Esso Italiana's amended grounds of appeal, and for its concession, if necessary, to be withdrawn, and went on to hear competing submissions as to the applicability of article IV, and in the light of that, amplified submissions as to the proper interpretation of the width of the jurisdiction clause.

The width of article IV

27. For convenience I restate the provisions of article IV:

> "If at any time a price or fee provided in this Agreement shall not conform to the applicable laws, regulations or orders of a government or other competent authority, appropriate price or fee adjustments will be made; provided, however, that in the event the Seller is at any time prevented from collecting, or Buyer is required to pay more than, the full price or fee provided for in this Agreement, including changes in said price or fee pursuant to other provisions hereof, the party adversely affected shall have the option at any time thereafter while such condition exists to cancel this Agreement as to any affected delivery location upon fifteen (15) days prior written notice to the other."

28. As to this clause, Mr Beard submitted as follows. The contract specified the prices that had to be paid under the contract in terms of Platts quoted prices plus the agreed differential, which differed from airport to airport. Article IV was intended to deal with the situation where government ("or other competent authority") by its "laws, regulation or orders" interfered with the prices or fees charged under the contract, so that those prices or fees did not "conform" to those laws etc. In such a case "appropriate price or fee adjustments will be made", ie so that the prices or fees charged shall be made to conform to the applicable laws, regulations or orders. There then follows the proviso of article IV, which permits "the party adversely affected", ie the seller if it is prevented from collecting the full price or fee provided for in the

contract, or the buyer if it is required to pay more than the price or fee provided for in the contract, to cancel the contract as to any affected airport upon written notice.

29. Mr Beard submitted that there is no room in such a provision for it to apply to prices inflated by cartel arrangements. The requirement is for prices to be adjusted to conform with law. However, article 101 does not operate by either invalidating contractual arrangements with customers of cartel operators or by requiring the prices charged to such customers to be adjusted to some new and acceptable norm. A cartel in breach of article 101 does not render any price or fee specified in a customer contract unlawful. On the contrary, article 101 operates by invalidating the arrangements *between* the cartel parties, and it gives their customers a remedy not in the form of adjusted contractual prices but in the form of damages for losses created by the cartel parties' breach of statutory duty. Those damages are to be quantified not necessarily by any uplift beyond some other hypothetical price, but by what the customer has lost. That might depend on many factors, including the degree to which the price can be said to have been inflated, such as whether the customer has been able to pass on the inflated price to its customers in turn (who themselves may therefore have a claim against the cartel parties for breach of statutory duty), or whether the customer has lost out on further sales that it might have made if it had been charged a lower price.

30. Moreover, it would make nonsense for the party affected by any requirement for an adjusted price lower than the cartel engendered inflated price (ie on this hypothesis Esso Italiana) to have a right to cancel the contract for any affected airport as a result: but that is the consequence required by the clause as Ryanair would construe it because the clause gives the right to cancel to the "party adversely affected" by the interference the right to cancel, not the party protected by the law's remedy for breach of article 101. And thus, as Mr Beard submits, the effect of Ryanair's reading of article IV is to distort the plain words of the clause and to create an absurd outcome in relation to the cancellation option terms.

31. Mr Beard further submitted that Ryanair's construction of the clause renders it otiose: because it is triggered by proof of a breach of statutory duty which provides its own remedy, and, on Ryanair's case, provides the very remedy which the statutory tort provides.

32. If therefore article IV does not cover or allow Ryanair's contract claim or permit the use to which Ryanair seeks to put it, then it becomes all the more unlikely that article 12.1 should be interpreted to cover a claim in statutory tort whose ramifications are so far removed from the considerations of contractual remedies which the parties would otherwise be reasonably regarded as having in mind in a jurisdiction clause which is concerned with "the resolution of disputes under this agreement", a fortiori where the same clause expressly excludes claims for "prospective profits or for indirect or consequential damages".

33. In this connection Mr Beard pointed out in his submissions some of the broad and idiosyncratic consequences of a claim for breach of statutory duty pursuant to article 101: such as that such a claim properly concerns tortious arrangements between rivals generally unrelated to a particular contract between a buyer and a seller; that such arrangements can come in all varieties; that it is possible to sue any member of a cartel for damages caused by each and any member of the cartel; that a customer of

various members of a cartel may have different jurisdiction clauses in its contracts with such members; that losses caused by different cartel arrangements may be very various; that in any case such losses may also vary from those caused by being charged prices higher than a more competitive model would indicate to losses on business missed because of inflated prices, ie losses due to non-sales (an example of loss of profits excluded from article IV); that direct customers from a cartel may suffer no loss because they have passed on the higher prices to *their* customers, in circumstances where it is *their* customers, so-called indirect purchasers, who have suffered the inflated prices and may correspondingly sue the cartel members. Mr Beard submitted that it is unlikely that parties to a clause such as article 12.1 contemplated such claims for damages for breach of statutory duty, which are likely to arise between multiple claimants and multiple defendants, as falling naturally or presumptively within a contractual jurisdiction clause.

34. Mr Auld on the other hand submitted, primarily, that the true construction of article IV was irrelevant in circumstances where jurisdiction for the contract claim had been conceded and another non-contractual claim (the claim for breach of statutory duty) arose out of the same facts, since the parties cannot have intended concurrent proceedings in different courts, viz in England and in Italy, to arise out of the same facts. That submission, however, confuses a question of construction (the scope of the jurisdiction clause), which has to be capable of being answered as at the date of contract, with the adventitious circumstances of a defendant's reaction to a particular claim. That, in my judgment, makes no sense at all, and asks the court to construe the jurisdiction clause on the basis of post-contract events.

35. Turning to the construction of article IV, Mr Auld submitted that "applicable laws, regulations or orders" are capable of encompassing EU competition law as applicable in Italy, and that the "laws…of a government or other competent authority" are likewise capable of encompassing those who enact the relevant EU law, and that the ICA decision to fine the cartelists can amount to an "order". However, Mr Auld was unable to explain how the ICA decision involved any price adjustment imposed by law, regulation or order.

36. As to article IV's requirement of a price adjustment to conform to the applicable law etc., Mr Auld's submission was essentially that it was inapplicable where Ryanair was not aware of the activities of the cartel. I am unable to derive assistance from that submission. In my judgment, article IV is designed to operate in circumstances where the parties are mutually aware of a law, regulation or order and its effect on contract prices, so that the contract prices are altered to conform with the applicable law, regulation or order. That demonstrates to my mind that the situation of cartel infringements of article 101 are simply not within the purview of article IV, for such infringements of course normally operate in secrecy and are only brought to light, if ever brought to light, subsequently.

37. As to article IV's provision for an adversely affected party being entitled to terminate the contract for any affected airport, Mr Auld had no answer other than to submit that such provisions were not engaged where a party prevents a price adjustment being made by concealing the unlawful nature of the price; and that the affected party could not be entitled to terminate the contract under article IV once the unlawfulness was discovered. This submission, and its failure to grapple with the language and sense of the clause, in my judgment demonstrate that article IV is simply not designed to

perform the function which Ryanair seeks to derive from it. The cartel inflated price is not unlawful, even though their effect on price may give rise to remedies. It is the cartel which is unlawful. If an unlawful cartel arrangement leads to a valid claim for damages for breach of statutory duty, there has been no "price or fee adjustments" to conform with law, as distinct from proven damages for breach of statutory duty. If Ryanair is ignorant of the operation of a cartel in inflating prices, it is not the ignorant Ryanair who is not in a position to operate the termination option of the clause: that option applies to the "adversely affected party", ie, on the current hypothesis Esso Italiana. The necessary conclusion is that Ryanair's construction of the clause simply does not begin to work.

38. Mr Auld submitted that article IV has to be construed to operate as Ryanair would seek to use it because otherwise Ryanair would have no claim for breach of contract despite the fact that prices charged under the contract were inflated by reason of cartel arrangements in breach of article 101. Therefore "reasonable commercial parties are to be understood as having intended it to mean" what Ryanair says it means. In my judgment, that is to cast all proper attempts to construe the clause by reference to its language, or to its purpose as indicated by its language, in favour of an infinitely broad process of interpretation derived from an invocation of the maxim of *ubi ius ibi remedium*, the maxim that there must always be a remedy for any right. However, the right is to be found in article 101 which brings with it its own remedy for breach of statutory duty.

39. The same answer is to be given to Mr Auld's new fall-back position that a term must be implied into the contract that prices would not be inflated in consequence of any breach by Esso Italiana of EU competition law. Mr Auld relies on *Attorney-General of Belize v. Belize Telecom Ltd* [2009] 1 WLR 1988 for this submission. However, there is no need to give a contractual remedy for breach of a statutory duty which brings with it its own remedy. Otherwise every single contract would involve such an implied term, yet such a term has never been found to exist.

40. In my judgment there is no answer to Mr Beard's powerful submissions concerning the construction of article IV. The clause simply was never intended to apply to the use to which Ryanair's contract claim seeks to put it.

41. It follows that there is no prospect of Ryanair having a contractual claim under article IV or an implied term such as would give a remedy, albeit limited to goods supplied under the contract itself, which reduplicated the effect of a statutory duty pursuant to article 101.

The scope of the jurisdiction clause

42. In the circumstances, I can be brief about the scope of the jurisdiction clause, for Mr Auld did not seek to submit that it would cover the claim in statutory duty in circumstances where there was no analogous contractual claim possible under the contract. In that I consider that he was right. His assertion of English jurisdiction within the jurisdiction clause had always been premised upon a contractual claim within article IV, both before the judge and on appeal.

43. In making that assertion, he had relied on *Fiona Trust* and *The Angelic Grace* and the cases which led up to those decisions and have led on from them.

44. *The Angelic Grace* was concerned with claims and cross-claims which arose on the same facts in both contract and tort. This court there said that it was common ground that the test, propounded by Mr Justice Mustill and approved by this court in *The Playa Larga* [1983] 2 Lloyd's Rep 171, was whether there was a sufficiently close connection between the tortious claim and the claim under the contract. Leggatt LJ continued (at 89 lhc):

> "In order that there should be a sufficiently close connection, as the Judge said, the claimant must show that the resolution of the contractual issue is necessary for a decision on the tortious claim, or, that the contractual and tortious disputes are so closely knitted together on the facts that an agreement to arbitrate on one can properly be construed as covering the other."

Ultimately therefore it is a question of construction of the jurisdiction clause (there the arbitration clause) in circumstances where there are parallel or closely analogous claims in both contract and tort. Without a contractual claim, however, this authority is of no assistance to Ryanair.

45. In *Fiona Trust* the question was whether issues arising out of the formation and validity of contract, rooted in the claimants' purported rescission of charterparties which they claimed to have been induced by bribery, to which purported rescission were added claims in tort for conspiracy and bribery, were all disputes "arising under this charter" for the purpose of the charter's arbitration clause. It was held that they were. Contractual and tortious issues again arose on the same facts. The purpose of parties to international arbitration agreements to channel all their disputes into a single arbitral forum was heavily emphasised (see Lord Hoffmann at paras [6], [7] and [8]). Some, but by no means all of that reasoning applies to non-exclusive jurisdiction clauses. In the context of arbitration clauses, however, Lord Hoffmann called for a "fresh start" to the analysis of their scope. He concluded:

> "13. In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at para 17: "if any businessman did not want to exclude disputes about the validity of a contract, it would be comparatively easy to say so."

46. Such reasoning, however, does not carry over into a situation where there is no contractual dispute (by which I intend to include disputes about contracts), but all that has happened is that a buyer has bought goods from a seller who has participated in a cartel. I think that rational businessmen would be surprised to be told that a non-exclusive jurisdiction clause bound or entitled the parties to that sale to litigate in a contractually agreed forum an entirely non-contractual claim for breach of statutory duty pursuant to article 101, the essence of which depended on proof of unlawful

arrangements between the seller and third parties with whom the buyer had no relationship whatsoever, and the gravamen of which was a matter which probably affected many other potential claimants, with whom such a buyer might very well wish to link itself.

47. Even on the assumption of a contractual link such as a claim under article IV, there is no authority in this or other jurisdictions which has been brought to our attention to support Ryanair's claim. In this connection, Esso Italiana relied before Eder J on *Provimi Ltd v. Roche Products Ltd* [2003] EWHC 961 (Comm), [2003] 2 All EWR (Comm) 683, where a group of claimants who had bought vitamins from various defendant manufacturing sellers of such products brought a claim for breach of statutory duty against them on the allegation, supported by a decision of the European Commission, that they had participated in an illegal cartel contrary to the then article 81. Such a multi-party claim involving multi-party defendants may be thought to be typical of such a claim for breach of statutory duty. Many of the defendants had jurisdiction clauses in their standard terms and conditions in favour of Swiss, German or French courts, and relied on them in an attempt to defeat jurisdiction in England, which had otherwise been established under the Brussels Convention. Aikens J, who heard evidence of foreign law about such jurisdiction clauses, held that the attempt to rely on them failed in each case. However, Eder J said that he was not assisted by *Provimi* because the case was largely, if not entirely influenced by principles of construction arising under Swiss, German or French law (at para [20]).

48. In this court, Mr Beard again referred to and relied on *Provimi*. However, Mr Auld also relied on one passage in *Provimi* (at para [120]), not referred to by Eder J, where Aikens J may seem to be suggesting that an English way of looking at the French clause ("exclusive jurisdiction over all and any disputes arising herefrom") would be to conclude "that the present disputes have arisen out of the legal relationship in connection with which the jurisdiction clauses were made". However, Aikens J immediately went on to discount such an English view, saying that he had to have regard to the fact that if the nature of the claim is tortious, "then a French court would be inclined to say that the dispute arises out of the tort". Aikens J commented further and more speculatively about such matters at para [124], where he balanced arguments as to whether the dispute can be said to arise out of the contract of sale or out of the pre-existing illegal cartel. It would seem that he was pondering on the width of the expression "arising from". This was prior to *Fiona Trust*, which disparaged fine distinctions of language and rather proceeded on the basis of what contracting parties would be reasonably understood to wish for in terms of one-stop adjudication of their contractual disputes.

49. Mr Auld cited *Provimi* at para [120] in support of his contention that a tortious claim which was intimately connected with a contractual claim would naturally fall within a contractual jurisdiction clause and even one which used the language of "disputes *under* this Agreement" (emphasis added). However, he did not submit to this court, and he had not submitted to Eder J, that a tortious claim which had to stand by itself could or should be considered to fall within the scope of that expression, however broadly it is interpreted in accordance with the doctrine of *Fiona Trust*. Therefore that question does not arise. But even if it did, I see nothing in the *Fiona Trust* doctrine of a presumption in favour of one-stop adjudication to justify a conclusion that the parties to this supply contract should reasonably be regarded as intending that a purely

tortious claim which lies against a cartel of Italian suppliers of fuel oil at Italian airports for breach of EU and/or Italian law should fall within the jurisdiction provisions of an English law contract, just because the claimant buyer is willing to limit his claim to only one of the cartel members, namely his seller, albeit his claim extends to the total supply from all the cartel members.

Conclusion

50. In sum, this appeal is allowed, for the reasons set out above.

Lord Justice Patten :

51. I agree.

Lord Justice Tomlinson :

52. I also agree.